In The

Supreme Court of the United States

October Term, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO.1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

vs.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE

LAWRENCE KRAUS
General Counsel

RICHARD B. BERMAN
Labor Counsel

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
1615 H Street, N.W.
Washington, D. C. 20062

ROBERT T. THOMPSON
FREDERICK A. STUART
THOMPSON, OGLETREE AND DEAKINS
First National Bank Tower
Atlanta, Georgia 30303
(404) 658-9300

Counsel for Amicus Curiae

(8929)

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BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the largest association of business and professional organizations in the United States, and is the principal spokesman for the American business community. The Chamber of Commerce has a direct membership of over 52,000 business firms and an underlying membership of approximately 5 million individuals and firms.

The Chamber of Commerce has a direct and legitimate interest in the issues raised in the present case. As citizens in virtually every community in this country, our individual and corporate members are vitally interested in all facets of state and local government, including public sector employment relations. Members of the business community are especially concerned with the advancement of sound personnel practices and employee relations which will insure the continued and uninterrupted operation of governmental functions. A labor dispute affords no reasonable excuse for public employees to disregard the welfare of the general public or inhibit the proper functions of government. Additionally, the business community provides through its tax dollars a substantial portion of the funds which support state and local governments and it shares every citizen's deep concern for the prudent expenditure of those tax dollars.

Because of these vital and legitimate interests of its members, the Chamber of Commerce respectfully submits the

1. This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

following brief as amicus curiae. The views expressed by the Chamber of Commerce on behalf of the business community reflect extensive experience with labor relations and collective bargaining in the private sector, and are intended to assist this Court in its resolution of the issues presented in the present case.

SUMMARY OF THE ARGUMENT

In urging reversal of the decision of the Supreme Court of the State of Wisconsin, the Chamber of Commerce has focused on that Court's assumption that the striking school teachers were entitled to a due process hearing broad enough to include deliberations on the nature of the action which was to be taken against them by the School Board. While the Chamber of Commerce recognizes that certain decisions of this Court stand for the proposition that some due process hearings must include deliberations on the kind of state action appropriate in the circumstances, we submit that not every due process hearing must be so broad. There are situations in which due process confers on individuals threatened with the loss of liberty or property only the right to demonstrate that they either did or did not engage in the conduct of which they stand accused; if they did so engage then due process is not offended when the state selects a particular response from a range of possible lawful alternatives, even though the appropriateness of that response is not at issue in the due process hearing. The Chamber of Commerce submits that this is such a case.

Public school teacher strikes are strictly prohibited by Wisconsin state law. Striking is legally sufficient cause for the discharge of a teacher under Wisconsin law, and it is also

sufficient cause for discharge under the employment contracts between the school teachers in this case and their School Board employer. By entering into these employment contracts, the teachers agreed that the School Board would have the exclusive authority to select discharge as a response when sufficient cause for the discharge of a teacher exists. Therefore, the due process hearing required in this case extended to those teachers accused of striking only the right to prove that they did not engage in the strike. Due process did not require that the teachers be accorded the right to a hearing to determine the appropriate action to be taken against those teachers found to have engaged in the strike.

Second, the particular conduct in question in this case, *i.e.*, striking in violation of an express prohibition, is not the kind of conduct which would bring this case within the control of this Court's decision in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the case on which the Wisconsin Supreme Court relies primarily for its assumption that every due process hearing must be broad enough to include deliberations on the kind of state action appropriate in the circumstances. *Morrissey* is a recognition that in some situations in which liberty or property interests are threatened by state action, mitigating circumstances, if known and considered, might warrant governmental action less severe than deprivation. In the teacher strike context, however, mitigating circumstances cannot justify or excuse a strike, and the selection of an appropriate response to the strike cannot be conditioned on the existence of such evidence. In the selection of an appropriate response, other factors must be considered — factors on which the striking teachers would have no proper evidence to present. Thus the broad hearing required in *Morrissey* would serve no essential purpose in the present case.

Accordingly, due process did not give the teachers the right to such a hearing.

Having chosen to focus its attention on the foregoing issues raised in this case, the Chamber of Commerce leaves to the parties the development of the issue of whether the School Board was a sufficiently impartial decision maker for purposes of the limited due process hearing required in this case.

ARGUMENT

I.

SUMMARY OF THE OPINION OF THE SUPREME COURT OF THE STATE OF WISCONSIN.

The Wisconsin Supreme Court decided all issues arising under Wisconsin state law in favor of the School Board. Specifically, the Wisconsin Supreme Court decided that the state ban on public employee strikes is valid and is not a denial of equal protection. *Hortonville Education Association v. Hortonville Joint School District*, 66 Wis.2d 469, 487 (1975). Second, the Wisconsin Supreme Court decided that under Wisconsin law the School Board had the power to discharge teachers who engage in a prohibited strike and that striking is legally sufficient cause for discharging a teacher. *Id.* at 481. Third, the Wisconsin Supreme Court decided that the fact that the School Board had other remedies under state law which it might have pursued does not mean that the teachers were denied equal protection when the School Board chose discharge as the remedy. *Id.* at 482-483.

Having disposed of the questions raised under state law, the Wisconsin Supreme Court turned to the constitutional questions of due process. The Court found that the teachers were discharged while they were still under contract with the School Board. *Id.* at 489. Therefore, the Court concluded that the teachers were deprived of a property right by state action and were entitled to due process of law under the Fourteenth Amendment. *Ibid.* Due process requires adequate notice and an opportunity to be heard, and the Court concluded that both requirements were met in this case. *Id.* at 491. However, the main contention of the Union and the teachers was that they were denied due process of law because the hearings were not considered and their discharges ordered by an impartial decision maker. *Ibid.* The Wisconsin Supreme Court found that the requirement of an impartial decision maker is well established as an essential component of procedural due process. *Id.* at 491-492. The Wisconsin Supreme Court interpreted existing United States Supreme Court authority to mean that procedural due process is not limited to the factual determination as to whether an individual did or did not engage in the particular conduct. It extends as well to the action taken by the state once that conduct is established. The Wisconsin Supreme Court, relying on this Court's decision in *Morrissey v. Brewer*, 408 U.S. 471 (1972) concluded that it is essential, even in cases of undisputed or stipulated facts, that an impartial decision maker be charged with the responsibility of determining what action shall be taken on the basis of those facts. *Hortonville*, 66 Wis. 2d at 493.

Turning to the facts of the case, the Wisconsin Supreme Court observed that the School Board was the collective

bargaining agent for the School District and thus was engaged in the collective bargaining process with the Union. The School Board therefore was not uninvolved in the events which precipitated decisions they were required to make. *Id.* at 493-494. The Court decided that the teachers were entitled to a determination of whether another course of action such as mediation, injunction, continued collective bargaining, or arbitration would have been a more reasonable response on the part of the decision maker. *Id.* at 496. The Court concluded that the School Board was not a sufficiently impartial decision maker in a constitutional sense to make such a determination, and, as a result, the teachers were denied due process of law. *Id.* at 494.

II.

THE DUE PROCESS REQUIRED IN THIS CASE DID NOT GIVE THE STRIKING TEACHERS THE RIGHT TO A HEARING TO DETERMINE THE APPROPRIATE ACTION TO BE TAKEN BY THE SCHOOL BOARD IN RESPONSE TO THE TEACHERS' CONDUCT.

The Wisconsin Supreme Court's decision stands for the proposition that a School Board which engages in collective-bargaining-type negotiations with employees and employee unions cannot also make the final decision to discharge those employees who strike in violation of state law where the strike is connected with or the result of the negotiations. This is true even though the School Board is charged by state law with the exclusive responsibility of hiring and firing its employees. Although the School Board can apparently invoke some other remedy in dealing with employees who strike in violation of state

law, a final decision which would deprive the striking employees of any property interest in their jobs, such as a decision to discharge, must be made by an impartial decision maker which cannot be the School Board. According to the Wisconsin Supreme Court, teachers who strike in violation of a state law absolutely forbidding strikes by public employees are entitled to a due process hearing before someone other than their employer to determine whether another course of action such as mediation, injunction, continued collective bargaining, or arbitration would be a more reasonable response than discharge. The Chamber of Commerce submits that this is an unwarranted extension of the protection granted by the Due Process Clause as it has been interpreted by the decisions of this Court. The teachers' employment contracts and the nature of the teachers' conduct necessarily limited the scope of the due process hearing required in this case.

A. By striking in violation of state law, the teachers gave the School Board legally sufficient cause under state law and under the teachers' employment contracts to discharge the striking teachers without a hearing to determine whether discharge was an appropriate response for the School Board to make.

The constitutional guarantee of procedural due process under the Fourteenth Amendment does not arise until there is present a legitimate "property" or "liberty" interest which is threatened by state action. As this Court stated in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 at 576-578 (1972):

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits . . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . . Property interests, of course, are not created by the Constitution. Rather, they are created *and their dimensions are defined* by existing rules or understandings that stem from an independent source." [Emphasis supplied.]

This Court went on to state that a person may have a protected property interest in public employment if contractual or statutory provisions guarantee continued employment absent "sufficient cause" for discharge. *Id.* at 576-578; *see Arnett v. Kennedy*, 416 U.S. 134 (1974) (Powell, J., concurring in part and concurring in the result in part).

The teachers in this case do have certain interests which are protected by the Fourteenth Amendment. Their protected interests are essentially property interests. These property interests are granted "and their dimensions are defined" both by the teachers' employment contracts with the School Board and by state law. The Wisconsin Supreme Court found that the teachers had been discharged during the terms of their 1973-1974 contracts with the School Board. *Hortonville*, 66 Wis.2d at 489. Each teacher contract incorporated by reference the 1972-1973

master contract between the School Board and the Union.[2] The master contract states in pertinent part as follows:

"MANAGEMENT RIGHTS

> The Board, on its own behalf, and on behalf of the electors of the District, hereby retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by applicable law, rules and regulations to establish the framework of school policies and projects including, but without limitation because of enumeration, the right:
>
> * * *
>
> 2. To employ and re-employ all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and scope of employment, *or their dismissal or demotion for just cause*, their promotion and their work assignment . . . [emphasis added]."[3]

In another context, the Wisconsin Supreme Court found that a school board, under state law, has the implied power to dismiss

2. A sample of this employment contract is found at Appendix, page A60.

3. The management rights clause is found in the 1972-1973 master contract between the School Board and the Union at Appendix, page A42-43.

a teacher for "good and sufficient cause." *Hortonville*, 66 Wis. 2d at 480. The implication is that a Wisconsin teacher has a right to continued employment until he gives his employer "good and sufficient cause" for discharge.

It is clear that the teachers' employment contracts and Wisconsin state law extended to the teachers in this case a protected property interest in their employment. Moreover, both the contracts and state law have defined the limits of that interest beyond which the interest cannot extend. The teachers in this case had a legitimate claim of entitlement to continued employment absent sufficient cause for discharge. In these circumstances, the teachers had a property interest safeguarded by due process, and the deprivation of that interest had to be accompanied by some form of notice and a hearing. *See Perry v. Sindermann*, 408 U.S. 593 (1972).

Although the teachers in this case were entitled to due process before they could be deprived finally of their property interests in their employment, there exists no fixed standard of due process which would automatically apply to their situation. As this Court stated in *Morrissey v. Brewer*, 408 U.S. 471 at 481 (1972):

> "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands . . . .Its flexibility is in its scope once it has been

> determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure."

The teachers' property interests in their employment were extended to them by their contracts with the School Board and by state law. Their entitlement to continued employment was conditioned on the terms of their contracts and on the limitations imposed by state law. Both the contracts and state law authorized discharge for sufficient cause, and the teachers' property interests in their employment were limited to that extent. A teacher who gives his employer sufficient cause for discharge within the meanings of the contract and state law therefore has no entitlement to continued employment and may be discharged at the option of the employer.

The Wisconsin Supreme Court specifically concluded as a matter of law that striking was sufficient cause for discharge under the contracts and under state law. The Court stated:

> "The respondents cite *Millar v. Joint School Dist.* (1957), 2 Wis. 2d 303, 312, 86 N.W. 2d 455, for the proposition that:
>
> 'A school board has implied power to dismiss a teacher before the expiration of his term of service for good and sufficient cause . . . . If a teacher fails to perform his duties under his contract, the board may discharge him from further service.'

* * *

> "Furthermore, the power of the board to discharge a teacher for 'just cause' is clearly preserved in the master contract [footnote omitted] between HEA and the school district.
>
> From the statutes, the cases cited, and the contract, we conclude the school board did have the power to discharge the teachers who engaged in the prohibited strike." *Hortonville*, 66 Wis.2d at 480-481.

By accepting the contracts which gave them their protected property interests, the teachers necessarily also accepted the express limitations on those interests. As discussed *supra*, the teachers agreed that the School Board would retain the right to discharge them for sufficient cause. Those teachers who engaged in the prohibited strike gave the School Board legally sufficient cause to discharge them, and, by agreement, the right to elect discharge as the appropriate response was vested exclusively in the School Board. Since, as a matter of Wisconsin law, engaging in a prohibited strike is sufficient cause for discharge, the teachers had no right to a due process hearing to determine if sufficient cause for discharge existed. Since, by agreement, the School Board retained the right to elect discharge, the teachers had no right to a due process hearing to determine whether discharge was the appropriate response for the School Board to make.[4]

4. The rule ought to be the same in the absence of an express agreement which permits the employer to retain the right to elect discharge. So long as the cause is sufficient and discharge is an appropriate response under state law, then the decision to discharge should be at the election of the employer. That decision should not need to be conditioned on a due process hearing to determine its appropriateness.

The property interests of the teachers were being threatened by state action; therefore, the teachers were entitled to procedural due process. But due process in this case extended to the teachers only the right to adequate notice of the charges against them and the right to a hearing to determine whether those charges were true. The Wisconsin Supreme Court found that the teachers were given adequate notice of the charges against them and they were notified that a disciplinary hearing was to be held at which they would be given the opportunity to present any statement or evidence relevant to the alleged conduct.[5] The hearing took place *before* the decision was made to discharge those teachers who engaged in the strike.[6] The

5. The concurring opinion of Hansen, J., to the decision of the Wisconsin Supreme Court treats the instant case as one for rescission of the contract on the theory that the teachers breached their contracts by striking and refusing to return to work. *Hortonville Education Association v. Hortonville Joint School District*, 66 Wis. 2d 469, 501-504 (1975). The argument has considerable merit, but the case ought to be treated more as involving discharge of the teachers under the terms of the contract since the hearings were styled as disciplinary hearings and discipline or punishment is not generally associated with contract actions. It appears clear that the School Board's intent was to proceed against the teachers under the contract on charges of misconduct.

6. It is submitted that the School Board gave the teachers greater process than was due in the circumstances. A post-termination hearing would apparently have been adequate to protect the teachers' interests in this case. *See* the concurring opinion of Powell, J., in *Arnett v. Kennedy*, 416 U.S. 134 (1974) in which he states:

> "In the present case, the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.
>
> *(Cont'd)*

interests of the teachers in this case were given protection consistent with the limitations inherent in those interests. Therefore, the procedure they were accorded comported fully with the requirements of due process.

B. The right in some cases to a hearing to determine the appropriate state action to be taken in response to improper conduct is designed to give the individual threatened with loss of liberty or property who has, in fact, engaged in the conduct the opportunity to present evidence which might mitigate the seriousness of the conduct or even excuse it altogether; under Wisconsin law, striking by public employees is absolutely prohibited and cannot be excused by mitigating evidence.

In their brief to the Wisconsin Supreme Court, the teachers offered this argument:

(Cont'd)

> Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. [Footnote omitted.]
>
> Appellee's countervailing interest is the continuation of his public employment pending an evidentiary hearing. Since appellee would be reinstated and awarded back pay if he prevails on the merits of his claim, appellee's actual injury would consist of a temporary interruption of his income during the interim. To be sure, even a temporary interruption of income could constitute a serious loss in many instances. But the possible deprivation is considerably less severe than that involved in *Kelly*, for example, where termination of welfare benefits to the recipient would have occurred in the face of 'brutal need.' [Citation omitted.]"

"The trial court held that there could be no defense to a charge of engaging in a prohibited strike other than to deny that there was a strike. Since there could be no defense to the strike, and since there was no denial of the Board's allegation that the teachers had engaged in a strike, the court concluded that it made no difference who the decision maker was, and, therefore, a lack of impartiality had no bearing on the result. That conclusion depends entirely on the implicit proposition that discharge is an automatic penalty upon proof of a prohibited strike. That underlying proposition is totally erroneous.

As previously noted, the normal and anticipated effect of the strike was for the School Board to seek injunctive relief from the courts. The long tradition in Wisconsin Public Employment Relations supports such a belief. The result of a strike ordinarily is the interjection of an independent intermediary who often is able to persuade the parties to reach an agreement satisfactory to both. Because public employees know that strikes are prohibited and yet compulsory arbitration is not available to most of them, they often invite the court's participation by engaging in strikes. Trial courts, while aware of the legislative prohibition against strikes, do not automatically enjoin them, for they are also aware that public employees are

denied both the right to strike and, except for police and firemen, the right to compulsory and binding arbitration. Thus, courts investigate the situation and listen to both sides and do not automatically interpose an injunctive decree.

Because of the recognition of the lack of bargaining leverage possessed by public employees, other courts are coming more and more to realize that an injunction should not be an automatic response to a public employee strike. [Citations omitted]. This is a recognition by the arm of the government charged with the enforcement of the laws that the remedy to be granted or penalty to be assessed for a violation cannot be automatic but must depend on the circumstances of a case. This position also recognizes that a proper policy goal of the court is to achieve a peaceful settlement of the labor dispute." Appellant's Brief and Appendix in the Supreme Court of the State of Wisconsin, pp. 23-24.

The teachers' argument amounts to this: Although public employees know that strikes are prohibited by Wisconsin state law, they frequently break the law and strike because they think they sometimes have the right to strike and because they have found through experience that the Wisconsin courts also think that public employees sometimes have the right to strike; therefore, on occasion they strike and take their negotiating demands to court; in due course, the court puts pressure on

their employer to settle, and labor peace in the public sector is maintained. To see contempt for the law turned into virtuous argument is indeed disturbing, but more disturbing is the fact that such an argument has found implicit acceptance in the decision of the Wisconsin Supreme Court.

The Wisconsin Supreme Court found that strikes by public school teachers are expressly prohibited by Wisconsin state law, and teachers who engage in such a strike can be discharged by their school board employer. Having thus found, the Wisconsin Supreme Court went on to hold that due process requires the interposition of an impartial decision maker to decide what action is to be taken against striking school teachers because only an impartial decision maker will fairly consider all of the facts and decide what response is reasonable in the circumstances. *Hortonville,* 66 Wis.2d at 493, 494, 496. The Wisconsin Supreme Court's decision that an impartial decision maker must be interposed in such a case so that all facts will be considered and a reasonable response selected is tantamount to saying that some public employee strikes are justifiable under Wisconsin law and a response less severe than discharge should be selected when the facts in evidence appear to justify the strike. If the Wisconsin Supreme Court wishes to tell the Wisconsin Legislature that "no strike" means "no strike except strikes that are justified," then that is strictly a state matter, but the Wisconsin Supreme Court should not be permitted to find its justification in the Due Process Clause where no such justification exists.

For its holding that an impartial decision maker was required in this case, the Wisconsin Supreme Court relied principally on this Court's decision in *Morrissey v. Brewer,*

supra. In particular the Wisconsin Court relied on the following statement found at page 488;

> "This [due process] hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that violation does not warrant revocation."

From this the Wisconsin Court concluded that even in cases of undisputed or stipulated facts, an impartial decision maker must be charged with the responsibility of determining what action shall be taken on the basis of those facts. This conclusion assumes that every due process hearing must be broad enough to include deliberations on the kind of state action which is appropriate under the circumstances. It is submitted that neither *Morrissey* nor the other decisions of this Court cited by the Wisconsin Supreme Court support such an assumption.

This Court's decision in *Morrissey* acknowledges the fact that in some situations in which protected liberty or property interests are threatened by state action, mitigating circumstances, if known and considered, might warrant governmental action less severe than deprivation. A due process hearing broad enough to include deliberation on the appropriate action to be taken would appear essential in these situations. *Morrissey* is

such a case. The Chief Justice in his sensitive discussion of the function of parole in the correctional process explained very clearly the kind of situation this Court had before it in *Morrissey:*

> "The enforcement leverage that supports the parole conditions derives from the authority to return the parolee to prison to serve out the balance of his sentence if he fails to abide by the rules. In practice, not every violation of parole conditions automatically leads to revocation. Typically, a parolee will be counseled to abide by the conditions of parole, and the parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid anti-social activity. [Footnote omitted]. . . . Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: Whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: Should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of

> rehabilitation? . . . The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing anti-social acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were." *Id.* at 478-480.

Mr. Justice Douglas in his dissent agreed substantially with this analysis with some elaboration:

> "The status he enjoys as a parolee is as important a right as those we reviewed in *Goldberg v. Kelly.* That status is conditioned upon not engaging in certain activities and perhaps in not leaving a certain area or locality. Violations of conditions of parole may be technical, they may be done unknowingly, they may be fleeting and of no consequence. [Footnote omitted]. . . . The parolee should, in the concept of fairness implicit in due process, have a chance to explain. . . . Words of explanation may be adequate to transform into trivia what looms large in the mind of the parole officer." *Id.* at 495.

Implicit in these analyses is the recognition that some violations of parole are serious and others are not and that society has an interest in differentiating between the two.

Second, it is recognized that mitigating circumstances may properly lessen the significance of the violation or excuse it altogether since it is only necessary that the parolee abide substantially by the conditions of parole. *Id.* at 479. Third, a selection of the proper response, once the nature and extent of the violation are known, must include consideration of both the purpose of the parole procedure in rehabilitating the parolee and the interests of society in being protected from anti-social acts. Selection of the proper response is therefore an exercise of discretion which must take into account (1) society's interest in a flexible parole revocation procedure which preserves its integrity by reserving serious measures for serious offenses, (2) factors which are peculiarly within the knowledge of the parolee, (3) the rehabilitating effect of available responses, and (4) the criminal justice system's fundamental responsibility to protect society. A parolee who has violated the conditions of his parole has a substantial interest in presenting evidence on the first three of these factors,[7] and the tribunal has a duty to condition the exercise of its discretion on the evidence adduced by the parolee. Therefore, the due process hearing required in such a case should be broad enough to include deliberations on the appropriate response to be made once a violation has been established.

The case presently before this Court is fundamently different from *Morrissey,* and the standard of due process

7. The fourth factor should properly be left within the sole discretion of the tribunal. The parolee would not possess evidence bearing on such a determination. Therefore, if this were the only factor to be considered in selecting an appropriate response, the due process hearing itself would not need to be broad enough to include deliberations on the appropriate response.

required is considerably less. The strike ban at issue is found in 1 Wisconsin Statutes, Section 111.70(4)(1) and provides:

> "Strikes prohibited. Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are hereby expressly prohibited."

On its face the strike ban is absolute; it does not recognize a distinction between just and unjust strikes. In *Morrissey,* this Court noted that a parolee need only abide substantially by the conditions of his parole, and revocation of parole is an appropriate response to be considered only when the parolee has failed to comply substantially with the conditions of his parole. Thus, every breach of conditions, though technically a violation, is not necessarily a violation of sufficient importance to make revocation of parole an appropriate response. In the present case, however, the strike ban does not allow for substantial compliance; a public employee cannot substantially strike or substantially not strike. Thus, every strike is a violation of state law regardless of the strikers' motivation or the magnitude of the strike, and, as the Wisconsin Supreme Court even recognized, discharge of the strikers is an appropriate response under state law.

The portion of the teachers' brief to the Wisconsin Supreme Court set forth, *supra,* argues that discharge is not an automatic penalty upon proof of a prohibited strike. We agree. Once a prohibited strike has been proven, the selection of a lawful response to the strike requires the exercise of discretion. The discretion at issue here, however, is fundamentally different from

the discretion at issue in *Morrissey*. In the present case, there is no necessity that the exercise of discretion be conditioned on the magnitude of the offense since the strike ban does not recognize degrees of striking. Second, there is no necessity that the exercise of discretion be conditioned on the existence of mitigating evidence since such evidence would normally be offered only in an effort to justify or excuse the strike itself; the strike ban does not recognize just or excusable strikes. Third, there is no necessity that the exercise of discretion be conditioned on the salutary effect available responses might have on the striking employees; a public employer who must deal with a strike is not normally, nor should he be, concerned with rehabilitating the strikers.

The only point at which the exercise of discretion is similar in the two cases is in the duty of the parole tribunal to weigh the effect its response will have on the criminal justice system's fundamental responsibility to protect society and the duty of the public employer to weigh the effect his response will have on the employer's fundamental responsibility to provide a social service. In the case of a school board that fundamental responsibility is the administration of the schools. In the teacher strike context, the only issues on which the striking teachers would have evidence to present (aside, of course, from the issue of whether they, in fact, engaged in the strike) are those issues on which the school board need not condition its exercise of discretion, *i.e.*, the magnitude of the strike, evidence in justification, and the salutary affect on the teachers of available responses. In other words, under state law the discretion vested in the school board to select discharge as a response to a strike is not conditioned on the strikers' reasons for striking but on

the purposes discharge would serve in the larger matter of administration of the schools which is the school board's primary responsibility.

If a hearing were held which was broad enough to include the issue of response to the strike, the hearing tribunal could not properly entertain evidence from the teachers on why they struck since the nature of the strike ban would make it improper for the tribunal to weigh that evidence in making its decision. Moreover, if such a hearing were held, the tribunal would not be obliged to entertain evidence from the teachers on the effect available responses would have on the administration of the schools since that is a management decision peculiarly within the responsibility of the school board. It should also be noted that such evidence would be suspect and of little value due to the bias of the teachers stemming from their immediate interest in the outcome of the board's decision. It appears clear therefore that no legitimate purpose would be served by a hearing of such breadth, and due process ought not to be invoked to require the doing of a purposeless act.

The Wisconsin Supreme Court's reliance on *Morrissey* for its assumption that every due process hearing must be broad enough to include deliberations on the appropriate response to be made is therefore misplaced. Mindful of the flexibility with which due process must be applied in each case, this Court fashioned a procedure in *Morrissey* which met the needs of that case. That procedure, however, does not transfer mechanically to the present case.

For its holding that an impartial decision maker is required in a due process hearing, the Wisconsin Supreme Court cited

three other cases decided by this Court. These three cases were not cited by the Wisconsin Court to support its assumption that every due process hearing must be broad enough to include deliberations on the appropriate response. In fact, they could not have been cited for that assumption because they clearly do not support it.

In *Gibson v. Berryhill,* 411 U.S. 564 (1973), this Court had before it a situation where optometrists who worked for a corporation were being brought before the State Board of Optometry on charges of unprofessional conduct because of their corporate affiliation. The State Board had the power to revoke licenses. The members of the State Board were all independent practitioners and were all members of the Optometric Association. None of the corporate optometrists were members of the Association. This Court held that the State Board was not a sufficiently impartial decision maker for purposes of due process since revocation of the corporate optometrists' licenses and the attendant increase in available patients might redound to the pecuniary benefit of the Board members. Due process was not otherwise offended by the nature of the proceedings, and the Court specifically stated that revocation of the licenses would be justified if the unprofessional conduct were proved. *Id.* at 578.

In *Ward v. Village of Monroeville,* 409 U.S. 57 (1972), the issue before this Court was whether a mayor/judge who had a pecuniary interest in the fines collected in cases brought before him was sufficiently impartial for due process purposes. The Court concluded that he was not because the incentive to convict might cause him to forget the burden of proof required to convict. The underlying assumption in the Court's opinion is

that a fine would be appropriate once a violation was established; due process is not designed to protect a convicted defendant from the fine but to protect the defendant from an unjust conviction.

In *Goldberg v. Kelly,* 397 U.S. 254 (1970), this Court held in part that due process requires an adequate hearing before termination of welfare benefits even though there is a later constitutionally fair proceeding. But the Court stated:

> "Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits." *Id.* at 267.

Clearly, one of the issues in that hearing is not whether termination of benefits is a proper response once grounds for termination have been established.

The Due Process Clause of the Fourteenth Amendment as interpreted by the decisions of this Court did not give the teachers in this case the right to a hearing broad enough to include the appropriate response to be made to the strike. That decision was exclusively within the discretion of the School Board, and the teachers were not entitled to influence that decision in a due process hearing. The due process hearing required in this case extended to the teachers only the right to prove, if they could, that they did not engage in the prohibited strike.

CONCLUSION

For the reasons set forth above, and those in the Petitioners' brief, it is respectfully requested that the judgment of the Supreme Court of the State of Wisconsin be reversed.

Respectfully submitted,

Lawrence Kraus
General Counsel

Richard B. Berman
Labor Counsel

CHAMBER OF
COMMERCE OF THE
UNITED STATES
OF AMERICA
1615 H Street, N.W.
Washington, D.C. 20062

Robert T. Thompson
Frederick A. Stuart
THOMPSON, OGLETREE
AND DEAKINS
First National Bank Tower
Atlanta, Georgia 30303

Counsel for Amicus Curiae